No. 22487

MAR 24 1969

IN THE

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ROBERT W. NEES,

Petitioner,

vs.

SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

On Petition For Review of an Order of the
Securities and Exchange Commission

PETITIONER'S REPLY BRIEF

FILED

[illegible]

WM. B. LUCK, CLERK

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TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statutes

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ISSUES INVOLVED

It is submitted that the Answering Brief of Respondent Commission begs the basic question involved in the Petition for Review. The question is whether on the record petitioner was afforded due process of law in the administrative proceedings against him. Respondent argues from the facts appearing in the record of the August hearings that evidence against petitioner is more than sufficient to sustain the Respondent's order against him.

But the real question is whether that record can be lawfully and constitutionally admitted at all against petitioner. For this reason the counter-statement of the issue, page 1, Answering Brief, is insufficient.

It may be said that the subsidiary questions to the basic question of due process are:

1. Despite the obvious fact that petitioner had been notified of charges made against him, was he duly notified of the hearing scheduled upon such charges?

2. Did the Respondent Commission's Division of Trading and Markets have the burden to prove petitioner was duly notified of such hearing?

3. Where the Hearing Examiner has specifically found petitioner was not duly notified of the hearing, and Respondent Commission found otherwise, has the burden of proof of notice been met?

4. If petitioner was not duly notified of the hearings, may Respondent's Division of Trading and Markets rely upon the record of the August hearings as to which notice was not given, in order to sustain charges against petitioner?

ARGUMENT

I

THE RESPONDENT COMMISSION DID NOT FOLLOW ACCEPTED PROCEDURES IN HEARING CHARGES AGAINST PETITIONER, WITHIN THE MEANING OF SUBSTANTIVE DUE PROCESS OF LAW.

In the Answering Brief, respondent maintains petitioner's complaint is a procedural one. Such terminology glosses over the import of the complaint of petitioner. Rather, it should be said petitioner raises the fundamental issue of due process -- substantive due process. To say, as respondent does at page 8 of its Answering Brief, that whether petitioner received due notification of the August hearings is "at most of academic interest," is to ignore completely the import of that fundamental issue - to say, in effect, that in administrative proceedings there is no need to be concerned about such a concept as substantive due process.

Under the heading "The Procedure Adopted Met the Requirements of Due Process" (page 9, Answering Brief) Respondent Commission takes the position that the Hearing Officer granted what petitioner had requested: he did "re-open hearings." Claiming that the constitutional guarantee of due process "does not mandate any particular form of procedure," respondent refers to "matters left to the discretion of the Agency

in the exercise of its housekeeping powers." Plainly the matters here complained of by petitioner surely exceed matters of mere "housekeeping powers," whatever that means.

In such manner, i.e., relying upon the semantics of the situation, respondent justifies the procedure employed: the Hearing Officer did "re-open hearings." Nothing is said of what must occur, in the interest of protecting petitioner's rights, when the hearings are re-opened. The questions involved in this petition as above set forth are ignored. Petitioner is not concerned with semantics; it is obvious hearings were re-opened. Not so obvious, in fact not be discerned from the record, is the proposition that petitioner was granted a full and fair hearing conforming to his constitutional rights.

The question whether such rights were afforded is not based upon the question, as respondent seems to claim at page 10 of the Answering Brief, whether a hearing de novo would inconvenience the respondent, its agencies or witnesses.

Too obvious to require extensive citation is the proposition that the burden of proof is on the agency, the Respondent Commission, which is held to the same burdens and obligations of proof as any other litigant who takes the affirmative. National Labor Relations Board v. Riverside Manufacturing Company, 119 F.2d 302. See Dayco Corp. v. F.T.C., 362 F. 2d 180.

Just as basic, as pointed out in petitioner's Opening Brief, when a hearing is had under a statute requiring a hearing, the hearing must conform to fair practices as they are known in the Anglo-Saxon jurisprudence. Takeo Tadno v. Manney, 160 F.2d 665 (1947).

An order must be based on hearing after due notice. Hoxsey Cancer Clinic v. Folsom, 155 Fed. Supp. 376.

Of course, the nub of the question here presented is just what was required in affording due process to petitioner, who had not been notified of the August hearings during which the substantial part of the evidence against all respondents was presented. As was well said by the court in Clemochefsky v. Celebrezze, 222 Fed. Supp. 73, 75 (1963):

> "It is elementary in cases of this nature that the Secretary's Findings of Fact and the reasonable inferences drawn therefrom are conclusive if they are supported by substantial evidence ... [Citing Authorities]. However, courts must now assume more responsibility than some courts have shown in the past for the reasonableness and fairness of decisions of Federal agencies, and Reviewing Courts must be influenced by a feeling that they are not to abdicate their conventional judicial function. Universal Camera Corp. v. National

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Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456(1951)"

The sentence last quoted is, of course, a para-phrasing of the language of the Supreme Court, by Mr. Justice Frankfurter, in the Universal Camera case, which reviews the history of, and basis for, judicial review of orders of administrative agencies. The Supreme Court also held in that case, where the administrative agency had overruled the finding of the Hearing Examiner, that in determining the substantiality of the evidence in the record, a report of the Hearing Examiner, who observed the witnesses, should be given reasonable weight even though his findings were reversed by the administrative agency.

Another case which reviews the requirement of due process in administrative hearings is United States v. Rasmussen, 222 Fed. Supp. 430 (1963). There an employee was suspended and removed on an express charge of fraud in the conduct of his office. The applicable regulations provided that any person so removed from office or employment or disqualified shall have the right to appeal for review of the facts, before another agency; there was no provision in the regulations for either hearing or review prior to suspension and removal from office. The court noted that this fact alone does not necessarily involve a denial of procedural due process and that administrative procedures need not conform to all the procedural niceties that surround the

judicial process. Defendant was granted a hearing on the appeal for "review of the facts" and was there present represented by counsel. The court concluded that by reason of the refusal of the reviewing agency at the hearing at which the employee was present to apprise him of the evidence against him and grant the rights of confrontation on cross-examination, there was a failure to meet the requirements of the regulations and a denial of due process in the conduct of the hearing.

It is interesting to note that Respondent Commission at page 10, of its Answering Brief cites Brown-Pacific-Maxom Co. v. Toner, 255 F.2d 611 (C.A. 7, 1958) as the only authority that even comes close to the actual issue involved in this case. As noted, in the situation there the agency relied upon correspondence neither in the record nor mentioned in its decision and had never given the complaining party an opportunity to respond to it. But apart from the factual situations involved, again the Court in that case conducted a thorough review of the requirement of due process in administrative hearings.

The court cited "a well-reasoned opinion," English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22, Annot., 18 A.L.R.2d 547. There, a police patrolman was dismissed from his position, and it was held he was deprived of a fair hearing inasmuch as the Civil Service Board in reaching its decision relied upon evidence taken outside the hearing and

outside the presence of English or his attorney. The Federal Court quoted, 217 P. 2d 24, from the California Opinion:

> " * * * Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present.
>
> " * * * The fact that there may be substantial and properly introduced evidence which supports the board's ruling is immaterial. * * * A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its termination upon information received without knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced." (Emphasis added)

II

THE CASES CITED BY RESPONDENT COMMISSION IN ITS ANSWERING BRIEF ARE DISTINGUISHABLE.

In the final analysis, Respondent Commission relies mainly upon the recent case of Hansen v. Securities and Exchange Commission, 396 F.2d 694 (C.A.D.C.) (Per Curiam), Cert. Den. 393 U.S. 847 (1968) (Ans. Br., p. 10). However, it may readily be seen from footnote 2 to the opinion in that case that a completely different factual situation was there presented, making the court's finding inapplicable to the case at hand: "Petitioner was notified in the prior proceeding that as an associate of Atlantic, under Commission Rule 9(b) he had a right to participate. 17 C.F.R. §201-9(b) (Supp. 1968). He declined. See Wallach v. Securities and Exchange Commission, 92 U.S. App. D.C. 108, 202 Fed. 2d 462 (1953)" (Emphasis suppled).

Petitioner, as found by the Hearing Examiner, was not notified of the August hearings and could not thus be bound by the record of those hearings. In point of fact and law it should be noted that the Wallach case, cited by the court in its footnote in Hansen, observed that §15(b) of the Securities and Exchange Act in effect provides the means for joining together in one judicial proceeding - civil or criminal - all parties deemed necessary by the Commission, whether salesman or employer.

The court stated "the determinations in such a proceeding would be res judicata in any future proceedings and by statutory direction are made applicable to the denial or revocation of broker-dealer registration under the Act." (pp. 463-464). Hence the court in Hansen had no choice but to rule as it did. Here the Respondent Commission is attempting to extend the rule of Hansen and Wallach and to say that the doctrine of res judicata is applicable to petitioner by virtue of the August hearings even though he was not notified of such hearings.

Respondent cites for comparison to Hansen (footnote 10, p. 11, Ans. Br.) the case of Giant Food, Inc. v. Federal Trade Commission, 322 F.2d 977 (C.A.D.C., 1963) Cert. Dism. 376 U.S. 967 (1964). Again, even quick reading of this case demonstrates that a different factual situation was there involved. Counsel for petitioner on a petition to review a Federal Trade Commission order had declined to re-examine certain buyer-witnesses on the ground that in the circumstances they would be made his witnesses. The Hearing Examiner assured counsel that even though called by him, at a later stage in the proceedings, they would not be regarded as his witnesses. The reviewing court found the position by counsel was ill-taken and that the testimony of such witnesses as previously given could not be stricken from the record. Petitioner has cited the Giant Food case at p. 13 of his Opening Brief for the principles there enunciated by the court, including its statement at p. 984:

> "'Because the Commission is at once, the accuser, the prosecutor, the judge and the jury' it must remain alert to observe accepted standards of fairness. The reviewing courts must, therefore, be alert to ascertain that the true substance of a fair hearing is not denied to a party, bearing in mind that the inordinate delay common in administrative hearings of the sort now before us is a legitimate cause of public concern."

At page 12 of the Answering Brief, and throughout the Brief, respondent refers to testimony of customer-witnesses and other individuals as given at the August hearings, again ignoring the import of petitioner's complaint, i.e., that the record of such testimony in view of lack of notice, cannot stand against petitioner. At page 12 respondent asserts witness Fred Colton was present at the re-opened hearings available for cross-examination. But petitioner, in the circumstances, was not required to rebut a case not yet made out against him. Obviously, as already cited, it was the burden of the Division of Trading and Markets of Respondent Commission to present its case against petitioner in a full and fair hearing of which petitioner had been given due notice.

To say further, as respondent does at pages 12-14 of the Answering Brief, that petitioner's form of objection to the

re-opened hearings as constituted was an improper general objection to evidence is again to ignore the thrust of petitioner's complaint on appeal. Whatever the semantics involved, it is clear from the record that counsel for petitioner made crystal clear to the hearing officer the position taken by him on behalf of petitioner: that petitioner could not be bound by the record of the August hearings, of which he was not duly notified, and that as a result the Respondent Commission had the burden in a full hearing of establishing its case, before the petitioner could be called upon to rebut such case. Counsel wanted the right of confrontation of all witnesses simultaneous with their full and direct testimony, and the right to contemporaneous cross-examination, a right which is constitutionally guaranteed.

CONCLUSION

For the reasons stated, the order of the Commission barring Nees from association with any broker or dealer should be set aside.

Respectfully submitted,

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